

SENATE BILL 3172

By Gilbert

AN ACT to amend Tennessee Code Annotated, Title 16, Chapter 3, Part 8; Title 38, Chapter 6; Title 40, Chapter 15; Title 40, Chapter 32 and Title 40, Chapter 35, relative to the eligibility and operation of various diversion programs, the expungement of records following diversion and the establishment and maintenance of a database of diversions entered and records expunged.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 40-15-105, is amended by deleting subsection (a)(1)(A) in its entirety and substituting instead the following:

(a) MEMORANDUM OF UNDERSTANDING PERMITTED. (1)(A) A qualified defendant may, by a memorandum of understanding with the prosecution, agree that the prosecution will be suspended for a specified period, not to exceed two (2) years from the filing of the memorandum of understanding. As a condition of such suspension the qualified defendant shall agree to pay ten dollars (\$10.00) per month as part payment of expenses incurred by the agency, department, program, group or association in supervising the defendant. Such payments shall be made to the agency, department, program, group or association responsible for the supervision of such defendant.

SECTION 2. Tennessee Code Annotated, Section 40-15-105, is further amended by deleting subsection (a)(1)(B) and substituting instead the following:

(B) For purposes of this section, "qualified defendant" means a defendant who meets each of the following requirements:

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(i) The defendant has not previously been granted pretrial diversion under the provisions of this chapter;

(ii) The defendant does not have a prior misdemeanor conviction for which a sentence of confinement is served or a prior felony conviction within a five-year period after completing the sentence or probationary program for such prior conviction; and

(iii) The offense for which the prosecution is being suspended is not a Class A or B felony, a sexual offense, driving under the influence of an intoxicant as prohibited by § 55-10-401, or vehicular assault as prohibited by § 39-13-106.

As used in subdivision (a)(1)(B)(iii), "sexual offense" means conduct which constitutes:

(aa) Aggravated rape, as described in § 39-13-502;

(bb) Rape, as described in § 39-13-503;

(cc) Aggravated sexual battery, as described in § 39-13-504;

(dd) Aggravated prostitution, as described in § 39-13-516;

(ee) Aggravated sexual exploitation of a minor, as described in § 39-17-1004;

(ff) Especially aggravated sexual exploitation of a minor, as described in § 39-17-1005;

(gg) Rape of a child, as described in § 39-13-522; or

(hh) Attempt, as described in § 39-12-101, solicitation, as described in § 39-12-102, or conspiracy, as described in § 39-12-103, to commit any of the offenses enumerated in this paragraph.

SECTION 3. Tennessee Code Annotated, Section 40-15-105, is further amended by deleting subpart (a)(1)(D) in its entirety.

SECTION 4. Tennessee Code Annotated, Section 40-15-105, is amended by deleting subsection (b)(2) and substituting instead the following:

(2) The trial court shall approve the memorandum of understanding unless the:

- (A) Prosecution has acted arbitrarily and capriciously;
- (B) Memorandum of understanding was obtained by fraud;
- (C) Diversion of the case is unlawful; or
- (D) Certificate from the Tennessee bureau of investigation required by § 40-15-106 is not attached.

SECTION 5. Tennessee Code Annotated, Section 40-15-105, is further amended by adding the following to the end of subsection (e):

Upon dismissing any warrant or charge against the defendant pursuant to this section, the judge shall send or cause to be sent an abstract of the order of dismissal to the Tennessee bureau of investigation for entry into its expunged criminal offender and pretrial diversion database. Such abstract shall include the name of the defendant, the defendant's date of birth and social security number, the offense for which diversion was granted, the date diversion was granted and the date the charge or warrant was dismissed. If the dismissal order contains this information, the judge may send a copy of such order to the bureau in lieu of an abstract.

SECTION 6. Tennessee Code Annotated, Title 40, Chapter 15, Part 1, is amended by adding the following new section to be designated as 40-15-106:

(a) No memorandum of understanding may be approved by the court on or after July 1, 1998 unless there is attached to it a certificate from the Tennessee bureau of investigation stating that according to its expunged criminal offender and pretrial diversion database the defendant has not:

- (1) Had a prior disqualifying felony or misdemeanor conviction:

(2) Previously been granted pretrial diversion under the provisions of this chapter; and

(3) Had the public records of a disqualifying criminal offense that was dismissed expunged pursuant to the provisions of Tennessee Code Annotated, Title 40, Chapter 32 or Section 40-35-313.

(b) The certificate provided by the bureau pursuant to this section is only a certification that according to its expunged criminal offender and pretrial diversion database the defendant is not disqualified under the criteria set out in subsection (a) of this section. The certificate is not a certification that the defendant is eligible for diversion pursuant to this chapter and it shall continue to be the duty of the district attorney and judge to make sufficient inquiry into the defendant's background to determine diversion eligibility.

SECTION 7. Tennessee Code Annotated, Section 40-32-101, is amended by adding the following new subsection (d):

(d)(1) Any court ordering the expungement of a person's public records of a criminal offense after the effective date of this act because the charge against such person was dismissed shall send or cause to be sent an abstract of such expungement order to the Tennessee bureau of investigation for entry into its expunged criminal offender and pretrial diversion database. The abstract shall contain the name of the person seeking expungement, the person's date of birth and social security number, the offense that was dismissed, the date and cause of such dismissal and the date the order of expungement is entered. If the expungement order contains this information, the judge may send a copy of such order to the bureau in lieu of an abstract.

(2) After the effective date of this act, a defendant petitioning a court for expungement of such defendant's records because the charge against such person was dismissed shall be assessed a fifty dollar (\$50.00) fee. Such fee shall be transmitted by

the clerk of such court to the state treasurer for deposit in a special fund to be used by the Tennessee bureau of investigation for the exclusive purpose of establishing and maintaining the expunged criminal offender and pretrial diversion database. The monies received in such fund shall be invested for the benefit of the fund by the state treasurer pursuant to § 9-4-603. Amounts in the fund shall not revert to the general fund of the state but shall, together with interest income credited to the fund, remain available for expenditure in subsequent fiscal years.

SECTION 8. Tennessee Code Annotated, Section 40-35-313, is amended by deleting subsection (a)(1) and substituting instead the following:

(a) (1) (A) The court may defer further proceedings against a qualified defendant and place such defendant on probation upon such reasonable conditions as it may require without entering a judgment of guilty and with the consent of the qualified defendant. Such deferral shall be for a period of time not less than the period of the maximum sentence for the misdemeanor with which the person is charged, or not more than the period of the maximum sentence of the felony with which the person is charged. The deferral is conditioned upon the defendant paying an amount to be determined by the court of not less than ten dollars (\$10.00) nor more than thirty-five dollars (\$35.00) per month as part payment of expenses incurred by the agency, department, program, group or association in supervising the defendant, and upon the defendant paying any or all additional costs of the defendant's supervision, counseling or treatment in a specified manner, based upon the defendant's ability to pay. Such payments shall be made to the clerk of the court in which proceedings against such defendant were pending, who shall send the payments to the agency, department, program, group or association responsible for the supervision of such defendant, unless such defendant is found to be indigent and without anticipated future funds with which to make such payment. The

clerk of the court collecting such payment is permitted to retain five percent (5%) of the proceeds collected for the handling and receiving of such proceeds as provided above.

(B) As used in this subsection a "qualified defendant" means a defendant who:

(i) Is found guilty of or pleads guilty to the offense for which deferral of further proceedings is sought;

(ii) Is not seeking deferral of further proceedings for a sexual offense or a Class A or Class B felony; and

(iii) Has not previously been convicted of a felony or a Class A misdemeanor.

As used in subsection (a)(1)(B)(ii), "sexual offense" means conduct which constitutes:

(aa) Aggravated rape, as described in § 39-13-502;

(bb) Rape, as described in § 39-13-503;

(cc) Aggravated sexual battery, as described in § 39-13-504;

(dd) Aggravated prostitution, as described in § 39-13-516;

(ee) Aggravated sexual exploitation of a minor, as described in § 39-17-1004;

(ff) Especially aggravated sexual exploitation of a minor, as described in § 39-17-1005;

(gg) Rape of a child, as described in § 39-13-522; or

(hh) Attempt, as described in § 39-12-101, solicitation, as described in § 39-12-102, or conspiracy, as described in § 39-12-103, to commit any of the offenses enumerated in this paragraph.

SECTION 9. Tennessee Code Annotated, Section 40-35-313, is amended by adding the following new subpart (3) to subsection (a):

(3)

(A) No order deferring further proceedings and placing the defendant on probation as authorized by this subsection may be entered by the court on or after July 1, 1998 unless there is attached to it a certificate from the Tennessee bureau of investigation stating that the defendant does not have a prior felony or Class A misdemeanor conviction.

(B) The certificate provided by the bureau pursuant to this section is only a certification that according to its expunged criminal offender and pretrial diversion database the defendant is not disqualified from deferral and probation under this section by virtue of a prior felony or Class A misdemeanor conviction. The certificate is not a certification that the defendant is eligible for such deferral and probation and it shall continue to be the duty of the district attorney and judge to make sufficient inquiry into the defendant's background to determine such eligibility.

SECTION 10. Tennessee Code Annotated, Section 40-35-313, is further amended by adding the following new subsection (c):

(c)

(1) Any court dismissing charges against a person and ordering the expungement of a person's public records following the discharge of proceedings pursuant to this section after the effective date of this act shall send or cause to be sent an abstract of such dismissal and expungement order to the Tennessee bureau of investigation for entry into its expunged criminal offender and pretrial diversion database. The abstract shall contain the name of the person seeking dismissal and expungement, the person's date of birth and social security number, the offense that was dismissed and the date such dismissal and expungement order is entered. If the dismissal and expungement order contains

this information, the judge may send a copy of such order to the bureau in lieu of an abstract.

(2) After the effective date of this act a defendant applying to a court for expungement of such defendant's records following successful completion of the diversion program authorized by this section, shall be assessed a fifty dollar (\$50.00) fee. Such fee shall be transmitted by the clerk of such court to the state treasurer for deposit in the special fund established in § 40-32-101(d).

SECTION 11. Tennessee Code Annotated, Title 38, Chapter 6, Part 1, is amended by adding the following as a new section:

38-6-118.

(a) The Tennessee bureau of investigation shall establish within the bureau an expunged criminal offender and pretrial diversion database. Such database shall consist of the name, date of birth, social security number, charging offense, date of dismissal and date of expungement of criminal offenders who have:

(1) Been granted diversion either under Tennessee Code Annotated, Title 40, Chapter 15, Part 1 or Section 40-35-313;

(2) Had the public records of such offense expunged following the dismissal of charges against the offender by reason of the successful completion of either such diversion program; or

(3) Had the public records of such offense expunged following the dismissal of charges for any other reason.

The bureau shall obtain the information for the database from the abstracts or copies of orders sent to it by judges pursuant to Tennessee Code Annotated, Sections 40-15-105, 40-32-101 and 40-35-313. The bureau shall also obtain information for the database from its confidential

records maintained for law enforcement purposes the public portion of which were expunged prior to the effective date of this act.

(b) When a judge or district attorney general requests a certificate from the bureau relative to a defendant's eligibility for pretrial diversion pursuant to Tennessee Code Annotated, Title 40, Chapter 15, Part 1 or Section 40-35-313, the bureau shall conduct a criminal history record check based upon the defendant's name, date of birth and social security number to determine if the defendant:

- (1) Has a prior felony or Class A misdemeanor conviction;
- (2) Has ever previously been granted a type of diversion; and
- (3) Has ever had an order expunging the public records of a criminal offense following the dismissal of charges entered on behalf of such defendant.

The bureau shall certify the results of such search to the requesting judge or district attorney. The bureau shall not be required to search any other source or database in order to make the certification required by this section.

(c) All revenue from the fifty dollar (\$50.00) expungement fee imposed by Tennessee Code Annotated, Sections 40-32-101(d)(2) and 40-35-313(c)(2) and placed by the treasurer in the special fund established in § 40-32-101(d)(2) shall be used by the bureau for the exclusive purpose of establishing and maintaining the expunged criminal offender and pretrial diversion database required by this section.

(d) Except for the purpose of certifying to judges and district attorneys the information required in subsection (b) of this section, the expunged criminal offender and pretrial diversion database created by this section is not a public record and shall be maintained as confidential by the bureau.

SECTION 12. Tennessee Code Annotated, Title 16, Chapter 3, Part 8, is amended by adding the following as a new section:

The administrative office of the courts, in consultation with the Tennessee bureau of investigation shall, by September 1, 1998, devise a standard form that may be used by the judges when ordering the dismissal of charges against a defendant following the successful completion of a diversion program under Tennessee Code Annotated, Title 40, Chapter 15 or Section 40-35-313 or the expungement of a defendant's public records following the dismissal of charges against the defendant. Such suggested order shall include a place for all information the courts are required to send to the Tennessee bureau of investigation pursuant to Tennessee Code Annotated, Section 40-15-105(e), 40-32-101(d) and 40-35-313(c) for entry into the bureau's expunged criminal offender and pretrial diversion database.

SECTION 13. This act shall take effect upon becoming a law, the public welfare requiring it.